

WISCONSIN SUPREME COURT CALENDAR

February 4, 2002

9:45 a.m.



00-3562

Donald R. Kitten v. State Dept. of
Workforce Development

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a ruling of the Waukesha County Circuit Court, Judge Donald J. Hassin presiding. Hassin had affirmed a decision by a hearing examiner for the Department of Workforce Development.

In this case, the Wisconsin Supreme Court will decide whether an eating disorder qualifies as a disability under the law. In making this determination, the Court will also decide whether a landlord can refuse to rent to an individual whom s/he *perceives* as having a disability.

This court has issued few decisions addressing claims of discrimination based on disability, and fewer still based on perceived disability.

Here is the background: In September 1998, Spencer Cennname, then 28, was looking to rent a condominium in Brookfield. He contacted Donald Kitten, a real estate broker with 25 years' experience about renting a unit that Kitten owned. When Cennname initially contacted Kitten, Cennname was an inpatient at Rogers Memorial Hospital in Waukesha where he was receiving treatment for the eating disorder bulimia. Although Cennname did not tell Kitten that he was calling from the hospital, Kitten knew this from his caller ID. When Kitten asked Cennname where he was living, Cennname said he was living with friends. Kitten then mentioned that Cennname must have a "pretty good job" in order to be able to afford the \$925 monthly rent for the condo. Cennname admitted that he was not working, but said he had a financial statement and a letter from his financial advisor (his father, a vice president at Merrill Lynch) that would prove he had adequate investments to guarantee a good income. The two arranged to meet the next day at the condo.

After viewing the condo the following day, Cennname told Kitten he wanted to rent it. He provided account balances, bank account numbers, and the names and telephone numbers of people who could be contacted to provide personal and financial references for him. While Kitten prepared the lease agreement, Cennname told him that he was currently living at the hospital where he was being treated for an eating disorder. Kitten then asked Cennname for a \$1,000 security deposit and \$925 in advance payment of the first month's rent. Kitten told Cennname that the money was non-refundable unless Cennname's credit did not check out – in which case the deal would dissolve and Kitten would return the money. Cennname's credit checked out, and Kitten cashed his check. Kitten did not, however, follow through on a promise to contact Cennname and send him the signed lease.

Cennname contacted Kitten to set a date to move in and questioned why he had not received the lease. The reason was that Kitten had spoken with his sister, a nurse, who

had told him that people with bulimia frequently are depressed and suicidal. Kitten told Cennane he was concerned that there would be a relapse and that he would “feel better” if Cennane paid him six months’ rent in advance. Cennane reluctantly agreed, fearing that he would otherwise lose the condo. Kitten then asked if he could call Cennane’s doctor, which Cennane also reluctantly agreed to. The doctor refused to answer Kitten’s questions.

Cennane later changed his mind about paying the six months’ rent and about giving his doctor permission to talk about his medical condition. He told Kitten these requests were unreasonable and offered to let him call his father for more information on his finances. Kitten did call, and spoke with Cennane’s mother. He expressed concern to her that Cennane might attempt suicide in the condo unit and endanger other tenants. He asked Cennane’s mother to co-sign the lease, which she agreed to do. Mother then called son and told him she would be co-signing the lease. He then contacted the Fair Housing Office, which urged him to meet again with Kitten and tape record the meeting. Cennane declined to do that. Cennane and Kitten spoke again and finally agreed that the deal was off. Cennane asked for his \$1,925 back, but Kitten refused.

Cennane then filed a complaint with the Department of Workforce Development (DWD) alleging discrimination on the basis of a disability. The hearing examiner (also called an administrative law judge – a lawyer working for the DWD who hears disputes) determined that Kitten had discriminated against Cennane by demanding six months’ rent in advance and asking to speak to his doctor. While the hearing examiner did not find that Cennane had an *actual* disability, she found that he had a *perceived* disability (in other words, Kitten had regarded him as a person with a disability) and had been treated differently because of it. She ordered Kitten to pay Cennane \$12,673 to cover Cennane’s out-of-pocket expenses (additional time at the hospital, additional rent Cennane had to pay for another apartment, and the original \$1,925). The hearing examiner further ordered Kitten to pay \$19,738 to Cennane for causing emotional distress, discriminating against him, and for Cennane’s legal fees.

Kitten appealed the decision to the circuit court, where he again lost. He appealed to the Court of Appeals, which also agreed with the hearing examiner’s decision and found specifically that the Wisconsin Open Housing Act protects people who are treated differently because they are perceived to have a disability – even if no actual disability exists.

Kitten then brought his case to the Supreme Court, which will decide whether the law protects people with perceived disabilities and whether an eating disorder meets the definition of a disability.